FILED

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAY O. HERNANDEZ,

Petitioner,

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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103 pp.

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit is still enforcing its heightened pleading standards in 42 U.S.C.1983 Civil Rights Deprivation Cases contrary to Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE and Leatherman (113 S.Ct. 1160)?

LIST OF ALL PARTIES

1. Ray O. Hernandez, Petitioner
2. C. Thomas Camp, Respondent
3. Michael Pitcock, Respondent
4. Bradley C. Miles, Attorney for Petitioner
5. Dan Morales, Attorney General of Texas
6. Brooks William (Bill) Conover, III, Assistant Attorney General of Texas
7. John W. Owens, Assistant Attorney General of Texas
8. The State Board of Dental Examiners, (a Dismissed Defendant)

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RAY O. HERNANDEZ,

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v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioner herein, RAY O. HERNANDEZ, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (No. 93-1304) dated July 8, 1994, therein confirming the United States DistrictCourt for the Northern District of Texas, San Angelo Division, in Civil Action No. 6: 92CV0041-W therein dismissing with prejudice the

Petitioner's 42 U.S.C. 1983 cause of action against the above named Respondents which is dated March 6, 1993. The aforementioned opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in this Petition as Appendix A. The Court of Appeals for the Fifth Circuit denied the Petitioner's Petition for Rehearing by Order dated July 28, 1994 and said Denial Order is reproduced herein as Appendix B. The Judgment of the United States District Court for the Northern District of Texas, San Angelo Division, dated March 6, 1993 is reproduced herein as Appendix C, and the Memorandum Opinion and Order, also dated March 6, 1993 in connection with said Judgment of Dismissal is reproduced herein as Appendix D.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 10.1.(a) and (c) and 13 of the Supreme Court of the United States . The Judgment of the United States Court of Appeals for the Fifth Circuit is dated July 8, 1994 (Appendix A) and the Order Denying Petitioner's Petition for Rehearing is dated July 28, 1994 (Appendix B).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 (the so-called "1983 Civil Rights Deprivation Statute" reads as follows, to wit:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

28 U.S.C. 1254(1) reads as follows, to wit:

"§1254. Courts of appeals; certiorari; certified questions

Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:

(l) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C. 1343(a)(3) reads as follows, to wit:

"1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United states."

42 U.S.C. 1988 reads as follows, to wit:

'In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. "

Rule 8 (a) of the FEDERAL RULES OF CIVIL PROCEDURE reads as follows, to wit:

"Rule 8 General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (l) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded. "

STATEMENT OF THE CASE

The Petitioner herein, RAY O. HERNANDEZ, filed his Original "1983" complaint against the Respondents herein on June 8, 1992 therein pleading a civil rights deprivation case against the Respondents as

authorized by 4.2 U.S.C. 1983, and also seeking recovery of attorney fees as authorized by 42 U.S.C. 1988. The Respondent, without first or ever filing a Motion for Summary Judgment, moved to dismiss the Petitioner's abovementioned complaint because, in the Respondent's opinion, the Petitioner was not able to meet the so-called "heightened pleading standards" (in 1983 civil rights deprivation cases) as required by the United States Court of Appeals for the Fifth Circuit to overcome the Respondent's qualified immunity defense. The Petitioner, in an effort to meet the Fifth Circuit's "heightened pleading standards" filed his Original Complaint, as aforementioned, on June 8, 1992 and said Complaint is reproduced herein as Appendix E and thereafter, on the 31st day of August, 1992, the Petitioner filed his First Amended Complaint, again in an effort to meet the Fifth Circuit's heightened pleading standards and said First Amended Complaint is reproduced herein as Appendix F and lastly, and again in an effort to meet the Fifth Circuit's heightened pleading standards, filed his Second Amended Complaint November 16, 1992 it is reproduced herein as Appendix G, and in the opinion of the Petitioner's undersigned attorney, each of the Petitioner's aforementioned Complaint's (Appendixes E, F, and G) all comply with Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE, because the aforementioned Complaints all contain " ...a short and plain statement of the

grounds upon which the court's jurisdiction depends ... and a short and plain statement of the claim showing that the pleader is entitled to relief and ... the relief the pleader seeks." It was error for the District Court to dismiss the Petitioner's Second Amended Original Complaint filed November 16, 1992 for the sole reason, in the opinion of the District Court Judge, that the Petitioner did not meet the Fifth Circuit's "heightened pleading standards" because the aforementioned heightened pleading standards was struck down by the Supreme Court of the United States in Leatherman, et al v. Tarrant County Narcotics Intelligence and Coordination Unit, et al 113 S.Ct. 1160; 122 L.Ed. 2d 512 (1993).

QUESTION PRESENTED FOR REVIEW RESTATED

Whether the United States Court of Appeals for the Fifth Circuit is still enforcing its heightened pleading standards in 42 U.S.C. 1983 Civil Rights Deprivation Cases contrary to Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE and Leatherman (113 S.Ct. 1160)?

ARGUMENTS AND AUTHORITIES

Whether the United States Court of Appeals for the Fifth Circuit is still enforcing its heightened pleading standards in 42 U.S.C. 1983 Civil Rights Deprivation Cases contrary to Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE and Leatherman (113 S. Ct. 1160)? This Petition for Certiorari should be granted because the United States Court of Appeals

for the Fifth Circuit is still enforcing its so-called "heightened pleading requirements or standards" in 42 U.S.C. 1983 Civil Rights Deprivation cases when the Defendants therein are not municipalities; however, this Court, in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, et al, (supra), decided March 3, 1993, 113 S.Ct. 1160 and 122 L.Ed. 2d 517, stated that the Fifth Circuit's heightened pleading standards are just what they purport to be "... a more demanding rule for pleading a complaint under Section 1983 than for pleading other cases or claims for relief." and this Court, in the Leatherman Case (supra), went even further and stated that it was "impossible" to square the heightened pleading standards required by the Fifth Circuit with the liberal notice pleading as required by FEDERAL RULES OF CIVIL PROCEDURE , because Rule 8 only requires "... a short and plain statement of the claim showing that the pleader is entitled to relief.", the aforementioned heightened pleading standards, in effect, amends Rule 8. The Supreme Court, went even further in the Leatherman Case and stated that "in the absence of such an amendment, (an amendment to Rule 8), federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner than later." Therefore, a litigant (the

Petitioner herein) is not required "... to set out in detail the facts upon which he bases his claim, ..." but only a "... short and plain statement of the claim which gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Leatherman Case supra; Conley vs. Gibson (1957) 355. U.S. 41. Since the Supreme Court has stated that the lower courts (the Circuit Courts of Appeal and the District Courts) are required to follow the existing Federal Rules of Civil Procedure as promulgated by the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit is prohibited from, in effect, amending Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE by still enforcing its so-called heightened pleading standards heretofore stated in Elliott v. Perez (5th Cir. 1985) 751 Fed 2d 1472 because those "heightened pleading standards" were STRUCK DOWN by this Honorable Court in its abovementioned Leatherman Case, supra, because, and until, this Court amends Rule 8 to require more than "a short statement for relief", the United States Circuit Courts and Federal District Courts may not and cannot require more stringent rules of pleadings for relief. Bodie v. City of Huntsville (1993) 114 S.Ct.41. It is noteworthy that the Respondents in this case, at the District Court level, never filed a

Motion for Summary Judgment to Dismiss nor sought real Discovery being explored or requested by said Respondents; therefore, the Petitioner in this case has been deprived of due process and use of the Courts because his complaints against said Respondents were summarily struck down by the District Court upon Motions to Dismiss by said Respondents to the District Court, and all, as abovementioned, because the District Court was of the opinion that the Petitioner did not meet "the Fifth Circuit's heightened pleadings standards".

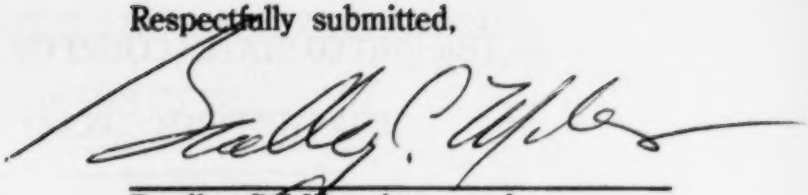
Chief Justice Rehnquist in the Leatherman Case, supra, writing for a unanimous Court, stated that "A federal court may not apply heightened pleading standards' more stringent than the usual pleading requirements of FEDERAL RULES OF CIVIL PROCEDURE Rule 8(a)—in civil rights cases alleging municipal liability under §1983." and the Supreme Court further stated that the "...5th Circuit's ...'heightened pleading standards'... are a more demanding rule for pleading" and therefore, same would be contrary to Federal Rules of Civil Procedure (8)(a)(2) and the Leatherman Case, supra, further stated that the only way to require a more stringent pleading requirement would be by amending the Federal Rules and "... not by judicial interpretation"; therefore, the Leatherman

Case, supra, should cover all "1983 defendants". Warwick Admin. Group v. Avon Prods. Inc. (1993) 820 F.Supp. 116. The 5th Circuit appears to be still enforcing its "heightened pleading standards" when the defendant in 1983 Cases is a nonmunicipality; therefore, this Court should grant this Petition for Certiorari in order for this Court to strike down, expressly, the 5th Circuit's "heightened pleading standards" as same is applied to all 1983 defendants. Richardson v. Oldham. 12 Fed.3d 1373 at 1380 (5th, 1994).

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, the Petitioner herein, RAY 0. HERNANDEZ, prays that this Court will grant this Petition for Certiorari, and thereupon reverse the Court of Appeals and remand this case back to the District Court in order for the Petitioner to have due process of law guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States of America for the abovementioned reasons.

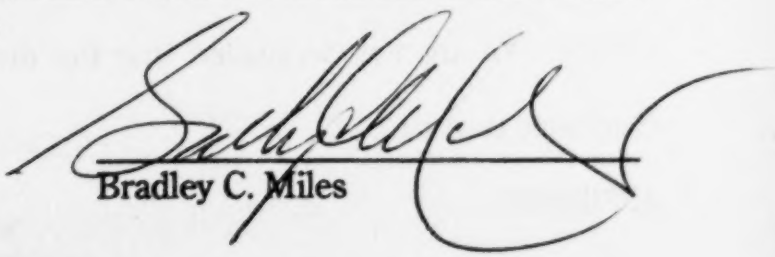
Respectfully submitted,



Bradley C. Miles, Attorney for
Petitioner
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
Texas Bar Card No. 14049000

CERTIFICATE OF SERVICE

This will certify that 3 true and correct copies of the above and foregoing Petition for Writ of Certiorari were sent to Mr. Dan Morales, Attorney General of Texas, and his Assistant, Mr. John W. Owens, Assistant Attorney General of Texas, attorneys for the abovenamed Respondents, via Certified Mail, Return Receipt Requested, and correctly addressed to Post Office Box 12548, Capitol Station, Austin, Texas 78711 (P 031 232 586) this 14th day of October, 1994.



Bradley C. Miles

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 08 1994
CHARLES R. FULBRUGE III
CLERK

No. 93-1304

RAY O. HERNANDEZ

Plaintiff - Appellant,

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, ET AL.,

Defendants,

C. THOMAS CAMP and MICHAEL PITCOCK,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(6: 92-CV-041)

Before KING, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

Oral argument has greatly assisted the panel in understanding the plaintiff-appellant's claims and the defendants-appellees' response thereto. We are not persuaded that the district court erred in dismissing the case.

AFFIRMED.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."* Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 28 1994
CHARLES R. FULBRUGE III
CLERK

No. 93-1304

RAY O. HERNANDEZ

Plaintiff - Appellant,

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, ET AL.,

Defendants,

C. THOMAS CAMP and MICHAEL PITCOCK,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(JULY 28, 1994)

Before KING, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT:
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR 11 1993
NANCY DOHERTY, CLERK
By _____ Deputy
ENTERED ON DOCKET
3-11-93 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

RAY O. HERNANDEZ

V.

C. THOMAS CAMP and
MICHAEL PITCOCK

CIVIL ACTION NO.
6:92CV0041-W

JUDGMENT

By Memorandum Opinion and Order of even date herewith, the Court has found that Defendants are entitled to judgment.

It is, accordingly, ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing of and from the Defendants, C. Thomas Camp and Michael Pitcock. Plaintiff's complaint and all claims and causes of action against said Defendants are **dismissed with prejudice.**

The Clerk shall furnish a copy hereof to all attorneys.

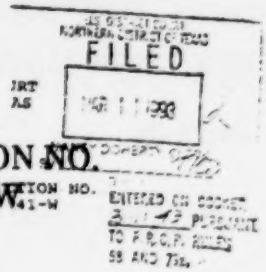
Dated March 6 1993.

Halbert O. Woodward

HALBERT O. WOODWARD
Senior United States District Judge

Certified a true copy of an instrument
on file in my office on 4-9-93
NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT:
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION



RAY O. HERNANDEZ

V.

C. THOMAS CAMP and
MICHAEL PITCOCK

CIVIL ACTION NO.
6:92CV0041-W

MEMORANDUM OPINION AND ORDER

The Court has considered the Defendants' supplemental Motion to Dismiss, seeking a dismissal of Plaintiff's claims as alleged in his Second Amended original Complaint, together with Plaintiff's response thereto. After reviewing the entire record before the Court, the court files this memorandum opinion in support of the judgment hereinafter ordered.

Plaintiff is seeking damages for alleged deprivation by Defendants of certain constitutional rights, all apparently arising out of an arrest and a subsequent dismissal of criminal charges for practicing dentistry without a license and the prosecution of a civil contempt action, also for practicing dentistry without a license .

Prior Orders of t his Court have dismissed other defendants and dismissed Plaintiffs' claims against Defendants Camp and Pitcock in

their official capacities only. Because Defendants Camp and Pitcock have raised the issue of qualified immunity, Plaintiff has been given two opportunities to amend his complaint to overcome this claim of qualified immunity.

By Order dated October 23, 1992, Plaintiff was ordered to amend his complaint and to set forth "particular facts which, if proved, would constitute violations of clearly established law of which a reasonable person would have known." Further, Plaintiff was directed to six areas in which he was to set forth specific facts to overcome the claim of qualified immunity.

The Court has reviewed the Second Amended Complaint and has compared it to the First Amended Complaint, and finds that, once again, Plaintiff has failed to alleged sufficient facts to overcome Defendants' claim of qualified immunity. Plaintiff's allegations are mere conclusions and beliefs and no specific facts are alleged to overcome the qualified immunity defense and support a judgment.

Defendants are being sued for alleged actions taken in their official capacities as agents of the Texas State Board of Dental Examiners. Texas has a comprehensive statute dealing with the practice of dentistry and the authority of the Texas State Board of Dental Examiners, its employees and

agents. Specifically, Tex. Rev. Civ. Stat. Ann. art. 4544a, Sec. 1 (Vernon Supp. 1993) provides that the Board and its employees and agents are "charged with the duty of aiding in the enforcement of the Statutes of this State regulating the practice of dentistry."

Plaintiff complains that Defendants participated in his arrest and the seizure of certain dental equipment, and that such action was taken in "bad faith" and with "malice," because Plaintiff believes that Defendants did not have authority or a legal right to be on Plaintiff's premises. However, Plaintiff admits that there was a valid arrest warrant and alleges that Defendants assisted the District Attorney's investigator in making the arrest.

Apparently Plaintiff had earlier been found in violation of the Texas Dental Practice Act and a proceeding for civil contempt was also filed by the County Attorney. Plaintiff alleges that Defendants were instrumental in causing the Court to assess additional fines and penalties for his alleged continued violation of the laws. "Mere conclusory allegations and bold assertions are insufficient to meet this heightened standard" for pleading facts sufficient to overcome a defendant's qualified immunity defense. Streetman v. Jordan, 918 F.2d 555, 557 (5th Cir. 1990); Jackson v. City of Beaumont Police Dept., 958

F.2d 616, 620 (5th Cir. 1992).

"Plaintiffs must demonstrate prior to discovery that their allegations are sufficiently fact-specific to remove the cloak of protection afforded by an immunity defense." Geter v. Fortenberry, 849 F.2d 1550, 1553 (5th Cir. 1988) (footnote omitted) (citing and quoting Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

Texas law provides protection from civil suit for employees of the Texas State Board of Dental Examiners, unless there is a showing of "fraud, conspiracy, or malice" on the part of the defendants. Specifically, Tex. Rev. Civ. Stat. Ann. art. 4551j (Vernon Supp. 1993) provides that:

> In the absence of fraud, conspiracy, or malice, no member of the Texas State Board of Dental Examiners, its employees, nor any witness called to testify by said board, nor any consultant or hearing officer appointed by said board shall be liable or subject to suit or suits for damages for alleged injury, wrong, loss, or damage allegedly caused by any of said persons for any investigation, report, recommendation, statement, evalu-ation, finding, order or award made in the course of any of said persons performing assigned, designated, official, or statutory duties. This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties.

The Court, therefore, finds that Plaintiff has failed to plead sufficient facts with the required specificity to overcome Defendants' claim of qualified immunity, and Defendants are entitled to a judgment

that Plaintiff take nothing against them and dismissing Plaintiff's case and all claims alleged with prejudice.

SO ORDERED.

Judgment shall be entered accordingly.

The Clerk shall furnish a copy hereof to all attorneys.

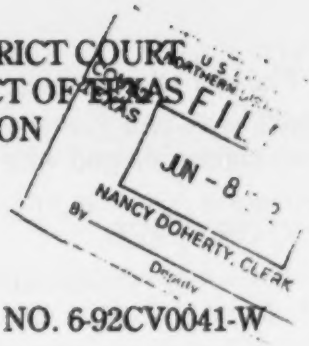
Dated March 6, 1993

Halbert O. Woodward

HALBERT O. WOODWARD
Senior United States District Judge

Certified a true copy of an instrument
on file in my office on 4-9-93
NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By Dawn O'Hearn Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION



RAY O. HERNANDEZ,
Plaintiff

VS.

NO. 6-92CV0041-W

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK,
Defendants

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RAY O. HERNANDEZ, hereinafter referred to as Plaintiff, and who is a citizen of the United States of America and a resident of San Angelo, Tom Green County, Texas, and herein complains of THE TEXAS STATE BOARD OF DENTAL EXAMINERS, its Acting Executive Director or Executive Director,: C. THOMAS CAMP, and MICHAEL PITCOCK, its Director of Enforcement. C. THOMAS CAMP and MICHAEL PITCOCK are being sued herein in their respective and aforementioned official capacities in THE TEXAS STATE BOARD OF DENTAL EXAMINERS and are being sued individually too.

I

At all times pertinent to this litigation, C. THOMAS CAMP was the Acting

Executive Director or Executive Director of THE TEXAS STATE BOARD OF DENTAL EXAMINERS and MICHAEL PITCOCK was Director of Enforcement for THE TEXAS STATE BOARD OF DENTAL EXAMINERS, and therefore, all of said Defendants were acting as employees of THE TEXAS STATE BOARD OF DENTAL EXAMINERS and acting under color of Texas State Law in connection with their aforementioned employment, and were enforcing the Defendant Board's policies and/or customs and/or procedures which as hereinafter more fully set forth, unlawfully and discriminatorily deprived Plaintiff of his Constitutional and/or Federal Rights.

II

All Defendants may be served with Citation herein at the main office of the Texas State Board of Dental Examiners located at 327 Congress Avenue, Suite 500, Austin, Travis County, Texas 78701-4037. The Defendants will be served at the aforementioned address with a copy of the Original Complaint along with a Summons to Answer within the time provided by law and a copy of this Complaint will also be sent to the Attorney General of Texas by Certified Mail, Return Receipt requested since the Defendant Board is a State Agency and the individual Defendants were acting as representatives of the Defendant Board and acting

in their respective capacities in carrying out the Board's customs, and/or procedures, and/or policies.

III

This is a Civil Rights action, herein seeking affirmative relief and/or damages against the Defendants for committing certain hereinafter enumerated actions wrongfully while acting under color of Texas State Law and which actions on the part of the Defendants deprived the Plaintiff of certain rights secured to him under the Constitution and the Laws of the United States of America and which actions on the part of said Defendants deprived the Plaintiff of his liberty and property without due process and/or due course of justice and/or abused due process and thereby violated the Plaintiff's Constitutional Rights as hereinafter more particularly set forth: A. Defendant MICHAEL PITCOCK, acting as Director of Enforcement for Defendant Board, went to a house owned by Plaintiff herein at 1625 Catalina Drive, San Angelo, Tom Green County, Texas on September 7, 1990, under Defendant C. THOMAS CAMP's direction and knowledge and as Agent of the Texas State Board of Dental Examiners, and which house was occupied by the Plaintiff's son and his family, ERNIE MARTINEZ HERNANDEZ, as a tenant, and arrested the Plaintiff for alleged practice of dentistry without a license even though

said Defendant did not have the legal right to be on the aforementioned premises owned by said Plaintiff because said Defendant was not a "peace officer" nor did he have the right to make arrests, nor did said Defendant observe the Plaintiff committing a crime or an alleged crime in his presence giving him the right to make a "citizen's arrest" . Thereafter, the Plaintiff was maliciously prosecuted by the County Attorney of Tom Green County, Texas or her assistants for alleged violation of the Texas Criminal Law in Cause No. 83,246 styled "The State of Texas vs. Ray O. Hernandez" in the County Court at Law of Tom Green County, Texas. The Plaintiff, after his aforementioned arrest, at the hands and direction of the aforenamed Defendants, was required to make a penal bond to secure his liberty pending trial of the aforenumbered criminal case and retain an attorney to defend him in said case. After the Plaintiff had made the abovementioned penal Appearance Bond and retained an attorney and paid a considerable a attorney fee, the aforementioned malicious criminal prosecution was dismissed. Defendants seized all dental equipment being used by Plaintiff 's son for Certification purposes .

B . After the abovementioned criminal prosecution was dismissed, after the Plaintiff had expended substantial sums of money to secure his

liberty pending the prosecution of said case by the making of a bail bond and by paying an attorney to defend him and secure the dismissal of theaforementioned criminal case, the Defendants again prosecuted the Plaintiff by filing Contempt of Court against him in Cause No. 54077-B, ll9th Judicial District Court of Tom Green County, Texas, styled "TEXAS STATE BOARD OF DENTAL EXAMINERS vs. RAY 0. HERNANDEZ", even though the basis of the abovementioned criminal prosecution and the aforementioned civil contempt prosecution were based upon the same alleged matter, namely, the alleged practice of dentistry by the Plaintiff without a dental license, and therefore, since both prosecutions were based upon the same alleged violation of Texas Law, the prosecution of the Civil Contempt case amounted to double jeopardy because the Defendants had already criminally prosecuted the Plaintiff in the abovementioned and numbered criminal case and which prosecution of the Plaintiff again was a deprivation of the Plaintiff's Constitutional Rights against double jeopardy .

C . Because of the Defendants' continued prosecution of the Plaintiff both criminally and civilly, as abovementioned, the Plaintiff was required to expend large sums of money for attorney fees in connection with the contempt proceedings and at the conclusion of the civil contempt pro-

ceedings, the Plaintiff was sentenced to 180 days in jail and fined $500.00 and was "encouraged" by the Trial Court to pay the Defendant, The Texas State Board of Dental Examiners, almost $10,000.00 to secure said Plaintiff's release from custody after serving one-third of the aforementioned 180 days, and even though the individual Defendants were "salaried" employees of the Texas State Board of Dental Examiners and their attorneys in connection with the criminal prosecution and the civil prosecution was the County Attorney of Tom Green County, Texas or the Attorney General's Office of the State of Texas .

D. Subsequent to the Plaintiff's incarceration pursuant to his being held in alleged Contempt of Court, as aforementioned, he sought release by the filing of Petitions for Writ of Habeas Corpus, first in the Texas Supreme Court (D-1705) and then in the United States District Court for the Northern District of Texas (CA6-91-0101-W) and the Defendant C. THOMAS CAMP, directed his attorneys (the AG office) to resist and oppose the Plaintiff's aforementioned Habeas Corpus proceeding, and, in fact, even successfully opposed, in Federal District Court, the Plaintiff's making bond pending a decision by said Federal Court on his pending Application for Writ of Habeas Corpus. On January 24, 1992, the Plaintiff filed a second Application for Habeas Corpus in the Texas Supreme

Court (Cause No. D-2005) and the Texas Supreme Court made a tentative ruling on the aforementioned date that the Plaintiff was being "illegally restrained" and Ordered his immediate release upon the posting of a $500.00 bond pending a final decision of the Texas Supreme Court. Thereafter, on March 25, 1992, the Supreme Court of Texas, by way of a Final Judgment, ruled that the Plaintiff had been illegally restrained of his liberty and officially discharged him from custody in connection with the abovementioned Contempt proceeding and even through the Defendants, during the pendency of the aforementioned second Habeas Corpus proceeding in the Supreme Court of Texas attempted on March 13, 1992 in the 119th Judicial District Court of Tom Green County, Texas to have the Plaintiff further incarcerated and caused the District Court to assess additional sums against the Plaintiff totalling $2,800.00 and even though the District Court did not have jurisdiction of said civil contempt proceeding since jurisdiction of said matter attached exclusively to the Supreme Court of Texas on January 24, 1992.

E. During the prosecution of the abovementioned contempt proceeding at the hands of the Defendants, the Plaintiff was denied his Constitutional Right of a jury trial and was incarcerated and deprived of his liberty

without due course of law thereby, and was denied bond during appellate proceedings.

F. Further, it should be noted that the Defendants' attorneys, the Attorney General the State of Texas and/or his assistants, are continuing to harass the Plaintiff and have him again incarcerated because the Defendants' attorneys, at the Defendants' direction and consent, are continuing to resist and oppose the Plaintiff's Habeas Corpus relief and the Plaintiff's efforts to set aside the Order of the District Court of Tom Green County, Texas therein assessing the abovementioned $2,800.00 against the Plaintiff on March 13, 1992 because said Defendants' attorneys have filed opposition to the Plaintiff's pending Application for Writ of Mandamus, No. D—2239 in the Supreme Court of Texas against JOHN E. SUTTON, the State District Judge who assessed the aforementioned $2,800.00 against said Plaintiff.

G. It should be noted that, as evidence of the Defendants' efforts to harass and prosecute the Plaintiff as aforementioned, the Defendants went to great lengths to entrap the Plaintiff by offering and paying persons to seek and allegedly receive alleged dental care from the Plaintiff, and said Defendants even attempted to hire and/or line up prospective witnesses to testify against the Plantiff's son, ERNIE MARTINEZ HERNANDEZ, in

an effort to discredit the said ERNIE MARTINEZ HERNANDEZ who was the Plaintiff's primary defense witness in behalf of said Plaintiff during the proposed criminal prosecution and later civil contempt prosecution and it is the Plaintiff's information and belief, and therefore he hereby alleges, that the Defendants attempted to intimidate and/or coerce dentists to testify against the Plaintiff and/or the Plaintiff's aforementioned and named son, and thereby obstruct justice

IV

The Defendants herein are not protected by the so-called "Doctrine of Qualified Immunity", because "qualified immunity" only encompasses those acts which fall within the official governmental duties or functions, and acts outside an officials scope of employment or duties, such as those acts of the Defendants mentioned hereinabove, are exceptions to the Doctrine of Qualified Immunity. Further, none of the Defendants herein is entitled to "absolute immunity".

V.

This Court has jurisdiction of this action under 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343, and venue is proper because the acts and transactions herein complained of occurred in Tom Green County, Texas which is located within the Northern District of Texas, San Angelo Division.

VI

The actions or inactions and deprivations hereinabove set forth were undertaken by the Defendants when they were acting under color of Texas State Law and the actions hereinabove complained of were intentional and willful and deliberate and exercised by the Defendants with the intent to violate and deprive the Plaintiff of certain Constitutional Rights guaranteed him by the First, Fourth, Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

VII

Because the actions on the part of the Defendants, which are hereinabove enumerated, were intentional and done with an intent to harm and harass the Plaintiff and to deprive him of his liberty and property (spend large sums of money for attorney fees), the Plaintiff is entitled to, not only the hereinafter mentioned monetary damages, he is also entitled to recovery from the Defendants reasonable attorney fees for the filing and prosecution of this Civil Rights proceeding as provided by 42 U.S.C. 1988.

VIII

Since all of the Defendants, acting either jointly and/or singly, acted in an arbitrary and malicious fashion to deprive the Plaintiff of his

abovementioned Constitutional Rights, he thereby suffered extreme emotional distress, severe mental anguish, humiliation, and actual incarceration in the Tom Green County Jail for over 75 days, the Plaintiff seeks judgment against the Defendants jointly and singly as follows, to wit:

1. Recovery of attorney fees paid attorneys heretofore to Defend the Plaintiff in connection with the abovementioned criminal and civil prosecutions and payment of attorney fees to secure the Plaintiff's release from jail by way of post judgment proceedings mentioned above of approximately $25,000.00;

2. Damages for actual, illegal incarceration of $75,000.00;

3. Extreme emotional distress, severe mental anguish, and humiliation of at least $500,000.00;

4. Punitive damages of at least $1,000,000.00;

5. Recovery of reasonable attorneys fees herein of approximately $25,000.00;

6. All costs of Court and such other relief which the Court deems just and equitable;

7. Pre-judgment and post-judgment interest on all damages recovered herein.

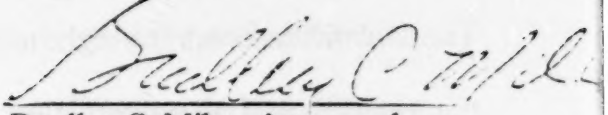
IX

The Plaintiff reserves the right to amend this Complaint should post-filing and pre-trial Discovery indicate the need for further pleadings and/or the joinder of other Defendants..

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff herein, RAY 0. HERNANDEZ, prays that the Defendants be cited to appear and answer herein as required by law, and that upon Hearing hereof, that the Plaintiff have Judgment in his favor and against the Defendants, jointly and singly, in an amount which this Court and the jury deems and determines to be fair, just and adequate compensation for all damages for the deprivation suffered by the Plaintiff at the hands of the Defendants as set forth above, and Plaintiff further prays for recovery of Court Costs and recovery of reasonable attorney fees which he has had to incur by the necessity of filing this lawsuit, and he further prays for such other relief to which he may show himself justly entitled to receive at law or in equity. PLAINTIFF REQUESTS A JURY.

Respectfully submitted,



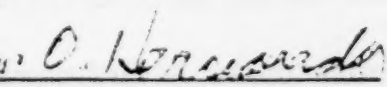
Bradley C. Miles, Attorney for Plaintiff
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
State Bar Card No. 14049000

THE STATE OF TEXAS §
§
COUNTY OF TOM GREEN §

BEFORE ME, the undersigned authority, on this day personally appeared RAY O. HERNANDEZ, who, after being by me duly sworn, upon his oath did state as follows:

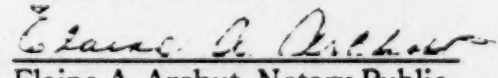
> "My name is RAY O. HERNANDEZ, and I am the Plaintiff in the above and foregoing Complaint and I have read same, and the facts stated therein are true and correct according to my knowledge and belief, and I am filing said Complaint in good faith in order to receive justice for the deprivations visited upon me by the Defendants named in said Complaint, and said Complaint is not being filed to be vexatious."

FURTHER AFFIANT SAYETH NOT.

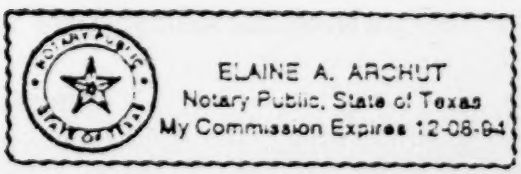


RAY O. HERNANDEZ, AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME, by RAY O. HERNANDEZ, this 8th day of June, 1992, to certify which, witness my hand and seal of office.



Elaine A. Archut, Notary Public in and for the State of Texas



MY COMMISSION EXPIRES:
12 - 8 - 94

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 21 1992
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

RAY O. HERNANDEZ,
Plaintiff

VS.

C. THOMAS
CAMP, AND MICHAEL PITCOCK,
Defendants

NO. 6-92CV0041-W

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RAY O. HERNANDEZ, hereinafter referred to as Plaintiff, and who is a citizen of the United States of America and a resident of San Angelo, Tom Green County, Texas, and herein files his First Amended Original Complaint pursuant to this Court's Order dated August 12, 1992, and in connection therewith, said Plaintiff would show the Court the following. The Defendants herein are C. THOMAS CAMP and MICHAEL PITCOCK, and the aforenamed Defendants are presently before the Court through their attorney of record, namely, Mr. JOHN OWENS, Assistant Attorney General of Texas, and the aforenamed attorney will receive a copy of this Amended Complaint as reflected by the Certificate of Service at the end hereof.

I

The aforenamed Defendants are being sued herein, individually, for certain hereinafter actions taken by said Defendants in their official capacities acting under color of Texas Law as the Executive Director of the Texas State Board of Dental Examiners (C. THOMAS CAMP) and Director of Enforcement for the Texas State Board of Dental Examiners (Michael Pitcock), because and as hereinafter mentioned, said Defendants "misused" or "abused" their aforementioned respective official capacities and thereby deprived the Plaintiff herein of certain Constitutional Rights, privileges, and immunities while acting under color of Texas Law, and therefore, said individual Defendants are not protected by the "Doctrine of Qualified Immunity" because said Defendants, when they were acting as hereinafter mentioned and complained of, outside their official duties or functions, and because it is the Plaintiff's contention, as hereinafter set forth, that said Defendants, particularly Defendant Pitcock, lacked "good faith" and with "malicious intent" when he caused the Plaintiff herein to be arrested on September 7, 1990 and thereafter prosecuted both criminally and quasi criminally for alleged "practicing dentistry without a license" as more particularly hereinafter set forth.

II

This is a Civil Rights action, herein seeking affirmative relief and/or damages against the Defendants for committing certain hereinafter enumerated actions wrongfully while acting under color of Texas State Law and which actions on the part of the Defendants deprived the Plaintiff of certain rights secured to him under the Constitution and the Laws of the United States of America and which actions on the part of the Defendants deprived the Plaintiff of his liberty and property without due process and/or due course of justice and/or abused due process and thereby violated the Plaintiff's Constitutional Rights as follows:

A. Defendant MICHAEL PITCOCK, acting as Director of Enforcement for the State Board of Dental Examiners, went to a house owned by Plaintiff herein at 1625 Catalina Drive, San Angelo, Tom Green County, Texas on September 7, 1990, under Defendant C. THOMAS CAMP'S direction and knowledge, and which house was occupied by the Plaintiff's son and his family, Ernie Martinez Hernandez, as a tenant, and arrested the Plaintiff for alleged practice of dentistry without a license even through said Defendant PITCOCK did not have the legal right to be on the aforementioned premises owned by said Plaintiff because said Defendant was not a "peace officer" nor did he have the right to make

arrests, nor did said Defendant observe the Plaintiff committing a crime or an alleged crime in his presence giving him the right to make a "citizen's arrest". Thereafter, the Plaintiff was first prosecuted by the County Attorney of Tom Green County, Texas or her assistants for alleged violation of the Texas Criminal Law in Cause No. 83,246 styled "The State of Texas vs. Ray O. Hernandez" in the County Court at Law of Tom Green County, Texas. The plaintiff, after his aforementioned arrest, at the hands and direction of the aforenamed Defendants, was required to make a penal bond to secure his liberty pending trial of the aforenumbered criminal case and retain an attorney to defend him in said case. After the Plaintiff had made the abovementioned penal Appearance Bond and retained an attorney and paid a considerable attorney fee, the aforementioned State criminal prosecution was dismissed. Defendants seized all dental equipment being used by the Plaintiff's son for Certification purposes and kept same for over a year.

B. After the abovementioned criminal prosecution was dismissed, after the Plaintiff had expended substantial sums of money to secure his liberty pending the prosecution of said case by the making of a bail bond and by paying an attorney to defend him and secure the dismissal of the aforementioned criminal case, the Defendants again prosecuted the

Defendants again prosecuted the Plaintiff by filing Contempt of Court against him in Cause No. 54,077-B, 119th Judicial District Court of Tom Green County, Texas, styled "Texas State Board of Dental Examiners vs. Ray O. Hernandez", even though the basis of the abovementioned criminal prosecution and the aforementioned civil contempt prosecution (quasi criminal prosecution) were based upon the same alleged matter, namely, the alleged practice of dentistry by the Plaintiff without a dental license, and therefore, since both prosecutions were based upon the same alleged violation of Texas Law, the prosecution of the Civil Contempt case amounted to double jeopardy because the Defendants had already criminally prosecuted the Plaintiff in the abovementioned and numbered criminal case and which prosecution of the Plaintiff again was a deprivation of the Plaintiff's Constitutional Rights against double jeopardy, a Fourth and Fifth Amendment violation.

C. Because of the Defendants' continued prosecution of the Plaintiff both criminally and civilly, (or quasi criminally), as abovementioned, the Plaintiff was required to expend large sums of money for attorney fees in connection with the contempt proceedings and at the conclusion of the civil contempt proceedings, the Plaintiff was sentenced to 180 days in jail and fined $500.00 and was "encouraged" by the Trial Court to pay the

Texas State Board of Dental Examiners almost $10,000.00 to secure said Plaintiff's release from custody after serving one-third of the aforementioned 180 days, and even though the Defendants herein are and were "salaried" employees of the Texas State Board of Dental Examiners and their attorneys in connection with the criminal prosecution was the County Attorney of Tom Green County, Texas or the Attorney General's Office and there was no testimony at trial on this.

D. Subsequent to the Plaintiff's incarceration pursuant to his being held in alleged Contempt of Court, as aforementioned, he sought release by filing of Petitions for Writ of Habeas Corpus, first in the Texas Supreme Court (D-1705) and then in the United States District Court for the Northern District of Texas (CA6-91-0101-W) and the Defendant C. THOMAS CAMP, directed his attorneys (the AG office) to resist and oppose the Plaintiff's aforementioned Habeas Corpus proceeding, and, in fact, even successfully opposed, in Federal District Court, the Plaintiff's making bond pending a decision by said Federal Court on his pending Application for Wri-t of Habeas Corpus, a Sixth, Seventh, and Eighth Amendment violation. On January 24, 1992, the Plaintiff filed a second Application for Habeas Corpus in the Texas Supreme Court (Cause No. D-2005) and the Texas Supreme Court made a tentative ruling on the

aforementioned date that the Plaintiff was being "illegally restrained" and Ordered his immediate release upon the posting of a $500.00 bond pending a final decision of the Texas Supreme Court. Thereafter, on March 25, 1992, the Supreme Court of Texas, by way of a Final Judgment, ruled that the Plaintiff had been illegally restrained of his liberty and officially discharged him from custody in connection with the abovementioned Contempt proceeding and even though the Defendants, during the pendency of the aforementioned second Habeas Corpus proceeding in the Supreme Court of Texas attempted on March 13, 1992 in the 119th Judicial District Court of Tom Green County, Texas to have the Plaintiff further incarcerated and caused the District Court to assess additional sums against the Plaintiff totaling $2,800.00 and even though the District Court did not have jurisdiction of said civil contempt proceeding since jurisdiction of said matter attached exclusively to the Supreme Court of Texas on January 24, 1992, a Fifth and Fourteenth Amendment violation.

E. During the prosecution of the abovementioned contempt proceeding at the hands of the Defendants, the Plaintiff was denied his Constitutional Right of a jury trial and was incarcerated and deprived of his liberty without due course of law thereby, and was denied bond during appellate

proceedings, a Sixth, Seventh, Eighth and Fourteenth Amendment violation.

F. Further, it should be noted that the Defendants' attorneys, the Attorney General of the State of Texas and/or his assistants, are continuing to harass the Plaintiff and have him again incarcerated because the Defendants' attorney, at the Defendants' direction and consent, are continuing to resist and oppose the Plaintiff's Habeas Corpus relief and the Plaintiff's efforts to set aside the Order of the District Court of Tom Green County, Texas therein assessing the abovementioned $2,800.00 against the Plaintiff on March 13, 1992 because said Defendants' attorneys are continuing to oppose Plaintiff's pending Application for Writ of Mandamus in the Supreme Court of Texas against JOHN E. SUTTON, the State District Judge who assessed the aforementioned $2,800.00 against said Plaintiff.

G. It should be noted that, as evidence of the Defendants' efforts to harass and prosecute the Plaintiff as aforementioned, the Defendants went to great lengths to entrap the Plaintiff by offering and paying persons to seek and allegedly receive alleged dental care from the Plaintiff, and said Defendants even attempted to hire and/or line up prospective witnesses (including a dentist in San Angelo) to testify against the Plaintiff's son,

ERNIE MARTINEZ HERNANDEZ, in an effort to discredit the said ERNIE MARTINEZ HERNANDEZ who was the Plaintiff's primary defense witness in behalf of said Plaintiff during the proposed criminal prosecution and later civil contempt prosecution and it is the Plaintiff's information and belief, and therefore he hereby alleges, that the Defendants attempted to intimidate and/or coerce dentists to testify against the Plaintiff and/or the Plaintiff's aforementioned and named son, and thereby obstruct justice, and thereby "abuse" due process, a Fifth and Fourteenth Amendment violation. All of the Defendants hereinabove complained of actions were taken by them while acting under color of Texas Law in their official capacities, but, and as abovementioned, said Defendants abused their official capacities and therefore acted outside the scope of their employment or official capacities and therefore said Defendants are individually liable to the Plaintiff for the deprivation of his abovementioned Constitutional Rights, privileges, and immunities.

III

This Court has jurisdiction of this action under 42 U.S.C. 198.3 and 28 U.S.C. 1331 and 1343, and venue is proper because the acts and transactions herein complained of occurred in Tom Green County, Texas which is located within the Northern District of Texas, San Angelo Division.

IV

The actions or inactions and deprivations hereinabove set forth were undertaken by the Defendants when they were acting under color of Texas State Law and the actions hereinabove complained of were intentional and willful and deliberate and exercised by the Defendants with the intent to violate and deprive the Plaintiff of certain Constitutional Rights guaranteed him by the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America, and all as more fully set forth above.

V.

Because the actions on the part of the Defendants, which were hereinabove enumerated, were intentional and done with an intent to harm and harass the Plaintiff and with a malicious intent, to deprive him of his liberty and property (spend large sums of money for attorney fees), the Plaintiff is entitled to, not only the hereinafter mentioned monetary damages, he is also entitled to recovery from the Defendants reasonable attorney fees for the filing and prosecution of this Civil Rights proceeding as provided by 42 U.S.C. 1988.

V.

Since the Defendants, acting either jointly and/or singly, acted in an

arbitrary and malicious fashion to deprive the Plaintiff of his abovementioned Constitutional Rights, he thereby suffered extreme emotional distress, severe mental anguish, humiliation, and actual incarceration in the Tom Green County Jail for over 75 days, the Plaintiff seeks judgment against the Defendants jointly and singly as follows, to wit:

1. Recovery of attorney fees paid attorneys heretofore to Defend the Plaintiff in connection with the abovementioned criminal and civil prosecutions and payment of attorney fees to secure the Plaintiff's release from jail by way of post judgment proceedings mentioned above of approximately $25,000.00.

2. Damages for actual, illegal incarceration of $75,000.00;

3. Extreme emotional distress, severe mental anguish, and humiliation of at least $500,000.00;

4. Punitive damages of at least $1,000,000.00;

5. Recovery of reasonable attorneys fees herein of approximately $25,000.00 for filing and prosecuting this suit;

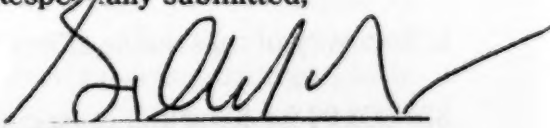
6. All costs of Court and such other relief which the Court deems just and equitable;

7. Pre-judgment and post-judgment interest on all damages recovered herein.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff herein, RAY O. HERNANDEZ, prays that the Defendants be cited to appear and answer herein as required by law, and that upon Hearing hereof, that the Plaintiff have Judgment in his favor and against the Defendants, jointly and singly, in an amount which this Court and the jury deems and determines to be fair, just and adequate compensation for all damages for the deprivation suffered by the Plaintiff at the hands of the Defendants as set forth above, and Plaintiff further prays for recovery of Court Costs and recovery of reasonable attorney fees which he has had to incur by the necessity of filing this lawsuit, and he further prays for such other relief to which he may show himself justly entitled to receive at law or in equity. PLAINTIFF REQUESTS A JURY.

Respectfully submitted,



Bradley C. Miles, Attorney for Plaintiff
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
State Bar Card No. 14049000

THE STATE OF TEXAS §
§
COUNTY OF TOM GREEN §

BEFORE ME, the undersigned authority, on this day personally appeared RAY O. HERNANDEZ, who, after being by me duly sworn, upon his oath did state as follows:

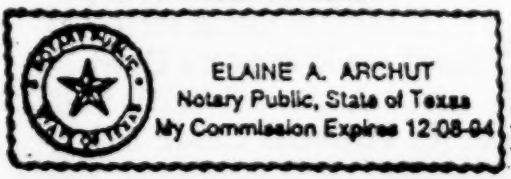
> "My name is RAY 0. HERNANDEZ, and I am the Plaintiff in the above and foregoing Complaint and I have read same, and the facts stated therein are true and correct according to my knowledge and belief, and I am filing said Complaint in good faith in order to receive justice for the deprivations visited upon me by the Defendants named in said Complaint and said Complaint is not being filed to be vexatious."

FURTHER AFFIANT SAYETH NOT.

Ray O. Hernandez

RAY O. HERNANDEZ, AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME, by RAY O. HERNANDEZ, this 31st day of August, 1992, to certify which, witness my hand and seal of office.



Elaine A. Archut

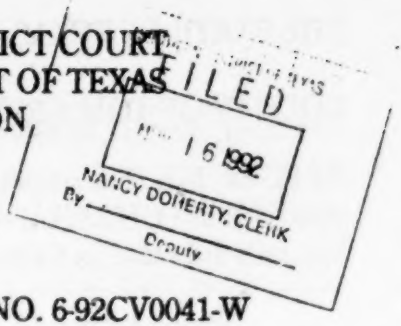
Elaine A. Archut, Notary Public
in and for the State of Texas
MY COMMISSION EXPIRES: 12-8-94

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above and foregoing Plaintiff's First Amended Original Complaint was sent to Mr. John Owens, Assistant Attorney General of Texas, Post Office Box 12548, Capitol Station, Austin, Texas 78711-2548 via Certified Mail, Return Rec,eipt Requested with sufficient postage affixed thereto this 31st day of August, 1992.

Bradley C. Miles

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION



RAY O. HERNANDEZ,
Plaintiff

VS.

C. THOMAS
CAMP, AND MICHAEL PITCOCK,
Defendants

NO. 6-92CV0041-W

PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RAY O. HERNANDEZ, hereinafter referred to as Plaintiff, and who is a citizen of the United States of America and a resident of San Angelo, Tom Green County, Texas, and herein files his Second Amended Original Complaint pursuant to this Court's Order dated October 23, 1992, and in connection therewith, said Plaintiff would show the Court the following. The Defendants herein are C. THOMAS CAMP and MICHAEL PITCOCK, and the aforenamed Defendants are presently before the Court through their attorney of record, namely, Mr. JOHN OWENS, Assistant Attorney General of Texas, and the aforenamed attorney will receive a copy of this Amended Complaint as reflected by the Certificate of Service at the end hereof.

I

The aforenamed Defendants are being sued herein, individually, for certain hereinafter actions taken by said Defendants in their official capacities acting under color of Texas Law as the Executive Director of the Texas State Board of Dental Examiners (C. THOMAS CAMP) and Director of Enforcement for the Texas State Board of Dental Examiners (Michael Pitcock), because and as hereinafter mentioned, said Defendants "misused" or "abused" their aforementioned respective official capacities and thereby deprived the Plaintiff herein of certain Constitutional Rights, privileges, and immunities while acting under color of Texas Law, and therefore, said individual Defendants are not protected by the "Doctrine of Qualified Immunity" because said Defendants, when they were acting as hereinafter mentioned and complained of, outside their official duties or functions, and because it is the Plaintiff's contention, as hereinafter set forth, that said Defendants, particularly Defendant Pitcock, lacked "good faith" and with "malicious intent" when he "assisted" in the Plaintiff's arrest on September 7, 1990 and when the Plaintiff was subsequently prosecuted both criminally and quasi criminally for alleged "practicing dentistry without a license" as more particularly hereinafter set forth.

II

This is a Civil Rights action, herein seeking affirmative relief and/or damages against the Defendants for committing certain hereinafter enumerated actions wrongfully while acting under color of Texas State Law and which actions on the part of the Defendants deprived the Plaintiff of certain rights secured to him under the Constitution and the Laws of the United States of America and which actions on the part of the Defendants deprived the Plaintiff of his liberty and property without due process and/or due course of justice and/or abused due process and thereby violated the Plaintiff's Constitutional Rights as follows:

A. Defendant MICHAEL PITCOCK, acting as Director of Enforcement for the State Board of Dental Examiners, went to a house owned by Plaintiff, but which house was leased to and in the possession of the Plaintiff's son, ERNIE MARTINEZ HERNANDEZ, at 1625 Catalina Drive, San Angelo, Tom Green County, Texas on September 7, 1990, under Defendant C. THOMAS CAMP'S direction and knowledge, and "arrested" the Plaintiff for alleged practice of dentistry without a license even through said Defendant PITCOCK did not have the legal right to be on the aforementioned premises owned by said Plaintiff because said Defendant was not a "peace officer" nor did he have the right to make

arrests, nor did said Defendant observe the Plaintiff committing a crime or an alleged crime in his presence giving him the right to make a "citizen's arrest". PITCOCK has stated that only the District Attorney's Investigator, Diane Wilson, had a warrant for the arrest of Plaintiff, but he has also testified that he (Pitcock) went out to "arrest" Plaintiff. The Plaintiff was first prosecuted by the County Attorney of Tom Green County, Texas or her assistants for alleged violation of the Texas Criminal Law in Cause No. 83,246 styled "The State of Texas vs. Ray O. Hernandez" in the County Court at Law of Tom Green County, Texas. The plaintiff, after his aforementioned arrest, was required to make a penal bond to secure his liberty pending trial of the aforenumbered criminal case and retain an attorney to defend him in said case. After the Plaintiff had made the abovementioned penal Appearance Bond and retained an attorney and paid a considerable attorney fee, the aforementioned State criminal prosecution was dismissed. After the Plaintiff was arrested and handcuffed on September 7, 1990, as abovementioned, Defendant PITCOCK and other members of the Texas Board of Dental Examiners, at the direction of the Executive Director thereof, Defendant C. THOMAS CAMP, seized all dental equipment in a small house located at the rear of 1625 Catalina Drive, San Angelo, Tom

Green County, Texas and even though the Plaintiff and his son, ERNIE MARTINEZ HERNANDEZ, informed Defendant PITCOCK that the dental equipment which was seized did not belong to the Plaintiff but that it belonged to ERNIE MARTINEZ HERNANDEZ and was being used by him for the purpose of studying for his Dental Laboratory Certification. After the Plaintiff was taken to the Tom Green County Jail on September 7, 1990 and while arrangements were being made for the posting of his bail bond, ERNIE MARTINEZ HERNANDEZ, and the Plaintiff's wife, DIANE HERNANDEZ, again informed the Defendant PITCOCK that the dental equipment which he had seized, as aforementioned, belonged to ERNIE MARTINEZ HERNANDEZ and not to RAY 0. HERNANDEZ: however, PITCOCK again refused to return said dental equipment to ERNIE MARTINEZ HERNANDEZ and remarked that he was going to keep it to prevent the Plaintiff from "allegedly" using same. The aforementioned actions on the part of Defendant PITCOCK are evidence of PITCOCK'S malicious intent and the "unreasonable bounds" and "harassment" and "abuse of powers" on the part of Defendant PITCOCK, and same violated the Plaintiff's Fourth and Fourteenth Amendment Rights. Further, the afore mentioned dental equipment was never used nor attempted to be introduced in evidence in the prosecution of the

Plaintiff in the State criminal nor contempt proceeding even though it was, at the time of the aforementioned dual prosecutions of the Plaintiff in the State Court, in the possession of Defendants CAMP and PITCOCK.

B. After the abovementioned criminal prosecution was dismissed, after the Plaintiff has expended substantial sums of money to secure his liberty pending the prosecution of said case by the making of a bail bond and by paying an attorney to defend him and secure the dismissal of the aforementioned criminal case, the Defendants again prosecuted the Plaintiff by filing Contempt of Court against him in Cause No. 54,077-B, 119th Judicial District Court of Tom Green County, Texas, styled "Texas State Board of Dental Examiners vs. Ray O. Hernandez", even though the basis of the abovementioned criminal prosecution and the aforementioned civil contempt prosecution (quasi criminal Prosecution) were based upon the same alleged matter, namely, the alleged practice of dentistry by the Plaintiff without a dental license, and therefore, since both prosecutions were based upon the same alleged violation of Texas Law, the prosecution of the Civil Contempt case amounted to double jeopardy because the Defendants had already criminally prosecuted the Plaintiff in the abovementioned and numbered criminal case and which prosecution of the Plaintiff again was a deprivation of the Plaintiff's

Constitutional Rights against double jeopardy, a Fourth and Fifth Amendment violation.

C. Because of the Defendants' continued prosecution of the Plaintiff both criminally and civilly, (or quasi criminally), as abovementioned, the Plaintiff was required to expend large sums of money for attorney fees in connection with the contempt proceedings and at the conclusion of the civil contempt proceedings, the Plaintiff was sentenced to 180 days in jail and fined $500.00 and was "encouraged" by the Trial Court to pay the Texas State Board of Dental Examiners almost $10,000.00 to secure said Plaintiff's release from custody after serving one-third of the aforementioned 180 days, and even though the Defendants herein are and were "salaried" employees of the Texas State Board of Dental Examiners and their attorneys in connection with the criminal prosecution was the County Attorney of Tom Green County, Texas or the Attorney General's Office.

The Plaintiff believes, and therefore alleges, that Defendant PITCOCK was at least "instrumental" in connection with the Court Assessing additional sums against the Plaintiff for alleged attorney fees, and investigatory fees, and reimbursement sums and which aforementioned sums were in addition to the fine imposed upon the Plaintiff by the State Trial

Judge because Defendant PITCOCK was allowed to attend even "In Chambers" conferences held before the State Trial Judge and the attorneys representing the Plaintiff and the Dental Board and even though the Plaintiff, himself, was not allowed to attend such conferences (only his attorney). Further, during the State contempt proceedings, Defendant PITCOCK brought into the Court Room and placed in apparent view of the trial judge the numerous boxes of dental equipment seized by said Defendant on September 7, 1990 for no legitimate purpose, because said equipment was never attempted to be introduced into evidence during said contempt proceedings nor did same belong to the Plaintiff as above stated and therefore, it appears that said Defendant only brought said boxes of dental equipment into the Court for the purpose of prejudicing the Plaintiff in the eyes of the Court and which prejudice resulted in the imposition of the fine and jail sentence imposed upon the Plaintiff by the Trial Judge, plus the abovementioned additional sums for attorney fees, investigation fees, and reimbursement fees. Also PITCOCK, through his attorney suggested to the Court that he forfeit the aforementioned equipment, even though he knew same was not the Plaintiff's as abovementioned. The Plaintiff believes and therefore alleges that the following set of facts demonstrate or tend to demonstrate the Defen-

dants' "over-reaching" or abuse or misuse of process and therefore amount to "continuing harassment" of said Plaintiff by the Defendants herein.

D. Subsequent to the Plaintiff's incarceration pursuant to his being held in alleged Contempt of Court, as aforementioned, he sought release by filing of Petitions for Writ of Habeas Corpus, first in the Texas Supreme Court (D-1705) and then in the United States District Court for the Northern District of Texas (CA6-91-0101-W) and the Defendant C. THOMAS CAMP, directed his attorneys (Attorney General's Office) to resist and oppose the Plaintiff's aforementioned Habeas Corpus proceeding, and, in fact, even successfully opposed, in Federal District Court, the Plaintiff's making bond pending a decision by said Federal Court on his pending Application for Writ of Habeas Corpus, a Sixth, Seventh, and Eighth Amendment violation. On January 24, 1992, the Plaintiff filed a second Application for Habeas Corpus in the Texas Supreme Court Cause No. (D-2005) and the Texas Supreme Court made a tentative ruling on the aforementioned date that the Plaintiff was being "illegally restrained" and Ordered his immediate release upon the posing of a $500.00 bond pending a final decision of the Texas Supreme Court. Thereafter, on March 25, 1992, the Supreme Court of Texas, by way of a

Final Judgment, ruled that the Plaintiff had been illegally restrained of his liberty and officially discharged him from custody in connection with the abovementioned Contempt proceeding and even though the Defendants, during the pendency of the aforementioned second Habeas Corpus proceeding in the Supreme Court of Texas attempted on March 13, 1992 in the 119th Judicial District Court of Tom Green County, Texas to have the Plaintiff further incarcerated and caused the District Court to assess additional sums against the Plaintiff totaling $2,800.00 and even though the District Court did not have jurisdiction of said civil contempt proceeding since jurisdiction of said matter attached exclusively to the Supreme Court of Texas on January 24, 1992, a Fifth and Fourteenth Amendment violation, namely "abuse of process!".

E. Further, it should be noted that the Defendants' attorney, the Attorney General of the State of Texas and/or his assistants, are continuing to harass the Plaintiff and have him again incarcerated because the Defendants' attorney, at the Defendants' direction and consent, are continuing to resist and oppose the Plaintiff's Habeas Corpus relief and the Plaintiff's efforts to set aside the Order of the District Court of Tom Green County, Texas therein assessing the abovementioned $2,800.00 against the Plaintiff on March 13, 1992 because said Defendants' attorneys are

continuing to oppose Plaintiff's pending Application for Writ of Mandamus in the Supreme Court of Texas against JOHN E. SUTTON, the State District Judge who assessed the aforementioned $2,800.00 against said Plaintiff.

As further evidence of the Defendants' "continuing harassment" of the Plaintiff, the Defendants' attorney, BROOKS WILLIAM CONOVER, III, and the Trial Judge, JOHN E. SUTTON, have communicated concerning "further procedures" to be brought against the Plaintiff in the State Court as is evidenced by Mr. Conover's affidavit contained as an exhibit in the Defendants Motion to Dismiss, now on file in this case. There is a letter from Mr. Conover to Judge Sutton confirming ex parte contact.

F. As further evidence of the Defendants' efforts to harass and prosecute the Plaintiff as aforementioned, it should be noted that the Defendants went to great lengths to entrap the Plaintiff by offering and paying persons to seek and allegedly receive alleged dental care from the Plaintiff, and for the purpose of getting the Plaintiff to violate the law which he would not have done otherwise, and said Defendants even attempted to hire and/or line up prospective witnesses (including a dentist in San Angelo) to testify against the Plaintiff's son, ERNIE

MARTINEZ HERNANDEZ, in an effort to discredit the said ERNIE MARTINEZ HERNANDEZ who was the Plaintiff's primary defense witness in behalf of said Plaintiff during the proposed criminal prosecution and later civil contempt prosecution and it is the Plaintiff's information and belief, and therefore he hereby alleges, that the Defendants attempted to intimidate and/or coerce dentists to testify against the Plaintiff and/or the Plaintiff's aforementioned and named son, and thereby obstruct justice, and thereby "abuse" due process, a Fifth and Fourteenth Amendment violation.

All of the Defendants hereinabove complained of actions were taken by them while acting under color of Texas Law in their official capacities, but, and as abovementioned, said Defendants abused their official capacities and therefore acted outside the scope of their employment or official capacities and therefore said Defendants are individually liable to the Plaintiff for the deprivation of his abovementioned Constitutional Rights, privileges, and immunities.

III

This Court has jurisdiction of this action under 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343, and venue is proper because the acts and transactions herein complained of occurred in Tom Green County, Texas which

is located within the Northern District of Texas, San Angelo, Division.

IV

The actions or inactions and deprivations hereinabove set forth were undertaken by the Defendants when they were acting under color of Texas State Law and the actions hereinabove complained of were intentional and willful and deliberate and exercised by the Defendants with the intent to violate and deprive the Plaintiff of certain Constitutional Rights guaranteed him by the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America, and all as more fully set forth above.

V.

Because the actions on the part of the Defendants, which were hereinabove enumerated, were intentional and done with an intent to harm and harass the Plaintiff and with a malicious intent, to deprive him of his liberty and property (spend large sums of money for attorney fees), the Plaintiff is entitled to, not only the hereinafter mentioned monetary damages, his is also entitled to recovery from the Defendants reasonable attorney fees for the filing and prosecution of this Civil Rights proceeding as provided by 42 U.S.C. 1988.

VI

Since the Defendants, acting either jointly and/or singly, acted in an arbitrary and malicious fashion to deprive the Plaintiff of his abovementioned Constitutional Rights, he thereby suffered extreme emotional distress, severe mental anguish, humiliation, and actual incarceration in the Tom Green County Jail for over 75 days, the Plaintiff seeks judgment against the Defendants jointly and singly as follows, to wit:

1. Recovery of attorney fees paid attorneys heretofore to Defend the Plaintiff in connection with the abovementioned criminal and civil prosecutions and payment of attorney fees to secure the Plaintiff's release from jail by way of post judgment proceedings mentioned above of approximately $25,000.00.

2. Damages for actual, illegal incarceration of $75,000.00;

3. Extreme emotional distress, severe mental anguish, and humiliation of at least $500,000.00;

4. Punitive damages of at least $1,000,000.00;

5. Recovery of reasonable attorneys fees herein of approximately $25,000.00 for filing and prosecuting this suit;

6. All costs of Court and such other relief which the Court deems just and equitable;

7. Pre-judgment and post-judgment interest on all damages recovered herein.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff herein, RAY 0. HERNANDEZ, prays that the Defendants be cited to appear and answer herein as required by law, and that upon Hearing hereof, that the Plaintiff have Judgment in his favor and against the Defendants, jointly and singly, in an amount which this Court and the jury deems and determines to be fair, just and adequate compensation for all damages for the deprivation suffered by the Plaintiff at the hands of the Defendants as set forth above, and Plaintiff further prays for recovery of Court Costs and recovery of reasonable attorney fees which he has had to incur by the necessity of filing this lawsuit, and he further prays for such other relief to which he may show himself justly entitled to receive at law or in equity. PLAINTIFF REQUESTS A JURY.

Respectfully submitted,

Bradley C. Miles, Attorney for Plaintiff
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
State Bar Card No. 14049000

THE STATE OF TEXAS §
§
COUNTY OF TOM GREEN §

BEFORE ME, the undersigned authority, on this day personally appeared RAY O. HERNANDEZ, who, after being by me duly sworn, upon his oath did state as follows:

> "My name is RAY 0. HERNANDEZ, and I am the Plaintiff in the above and foregoing Complaint and I have read same, and the facts stated therein are true and correct according to my knowledge and belief, and I am filing said Complaint in good faith in order to receive justice for the deprivations visited upon me by the Defendants named in said Complaint and said Complaint is not being filed to be vexatious."

FURTHER AFFIANT SAYETH NOT.

Ray O. Hernandez
RAY O. HERNANDEZ, AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME, by RAY O. HERNANDEZ, this 16th day of November, 1992, to certify which, witness my hand and seal of office.

Elaine A. Archut
Elaine A. Archut, Notary Public
in and for the State of Texas
MY COMMISSION EXPIRES: 12-8-94

NOTARY PUBLIC STATE OF TEXAS
ELAINE A. ARCHUT
Notary Public, State of Texas
My Commission Expires 12-08-94

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above and foregoing Plaintiff's Second Amended Original Complaint was sent to Mr. John Owens, Assistant Attorney General of Texas, Post Office Box 12548, Capitol Station, Austin, Texas 78711-2548 via Certified Mail, Return Rec,eipt Requested with sufficient postage affixed thereto this 16th day of November, 1992.

Bradley C. Miles

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Mr. John Owens
Post Office Box 12548
Capitol Station
Austin, Texas 78711-2548

RECEIVED
MAILCENTER
NOV 19 1992
OFFICE OF THE
ATTORNEY GENERAL
AUSTIN, TEXAS 78711

4a. Article Number
P 874 081 698

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
11-21-92

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
Ltd

PS Form 3811, November 1990 ☆U.S. GPO: 1991—287-068 **DOMESTIC RETURN RECEIPT**

PS Form 3800, June 1990

Certified Mail Receipt

P 874 081 698

Mr. John Owens
P.O. Box 12548
Capitol Station
Austin, TX 78711-2548

Postage	$ 2.28
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.05
Return Receipt Showing to Whom, Date, & Addressee's Address	$ 0.95
TOTAL Postage & Fees	

Postmark or Date
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TX

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

****

RAY O. HERNANDEZ,
Petitioner

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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QUESTION PRESENTED FOR REVIEW

May a 42 U.S.C. §1983 complaint brought against individual government officials be dismissed under Fed.R.Civ.P. 12(b)(6) for failure to comply with a fact specific pleading requirement, or is such a dismissal prohibited by either Fed.R.Civ.P. 8 or by this Court's holding in *Leatherman?*

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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

****

RAY O. HERNANDEZ,
Petitioner

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are at issue: U.S. Const. Amend. V and XIV, 42 U.S.C. §1983, and 28 U.S.C. §2072(b).

STATEMENT OF THE CASE

On June 8, 1992 Petitioner filed his original complaint in the United States District Court for the Northern District of Texas, San Angelo Division pursuant to 42 U.S.C. §1983, seeking damages for the alleged deprivation of numerous constitutional rights. The alleged basis for Petitioner's constitutional claims arose out of an arrest and subsequent dismissal of criminal charges for practicing dentistry without a license, and the prosecution of a civil contempt action, also for practicing dentistry without a license. Petitioner named the Texas State Board of Dental Examiners (TSBDE), C. Thomas Camp, Executive Director of TSBDE, and Michael

Pitcock, Director of Enforcement of TSBDE, as defendants. Petitioner sued Camp and Pitcock in both their official and individual capacities.

On August 14, 1992, the District Court dismissed both Camp and Pitcock in their official capacities, and the TSBDE, holding that Petitioner had failed to state a valid claim because neither the state nor its agencies or officials were "persons" under §1983. With respect to Camp and Pitcock in their individual capacities, the District Court ordered Petitioner to plead specific facts which, if proved, would overcome Respondents' defense of qualified immunity. Petitioner filed his First Amended Complaint on August 31, 1992. The District Court held that Petitioner had not sufficiently plead specific facts which, if proved, would overcome Respondents' defense of qualified immunity. On October 26, 1992, in an effort to allow Petitioner every opportunity to state a claim upon which relief could be granted, Petitioner was once again ordered to amend his complaint to set forth particular facts which, if proved, would constitute violations of clearly established law of which a reasonable person would have known. Further, the District Court directed Petitioner to six specific areas in which he was to set forth specific facts to overcome Respondents' claim of qualified immunity. Petitioner filed his Second Amended Complaint on November 16, 1992. On March 11, 1993, the District Court found that Petitioner had "once again, [] failed to allege sufficient facts to overcome [Respondents]' claim of qualified immunity. [Petitioner]'s allegations are mere conclusions and beliefs and no specific facts are alleged to overcome the qualified immunity defense and support a judgment." After having given Petitioner two opportunities to amend his complaint to state a claim upon which relief could be granted, the District Court dismissed Petitioner's claims against Camp and Pitcock in their individual capacities with prejudice, and rendered final judgment in favor of Respondents.

On July 8, 1994, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal. Petitioner's subsequent Petition for Rehearing to the Fifth Circuit was denied on July 28, 1994.

REASONS FOR DENYING THE WRIT

ARGUMENT AND AUTHORITY

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SUBSTANTIVE DEFENSE OF QUALIFIED IMMUNITY REQUIRES FACT SPECIFIC PLEADING IN ACCORDANCE WITH THE RULES ENABLING ACT, 28 U.S.C. §2072(b).

The question presented to this Court centers around the Fifth Circuit requirement of fact specific pleading when a 42 U.S.C. §1983 action is brought against government officials who are entitled to raise the substantive defense of qualified immunity. *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). Petitioner claims that the fact specific[1], or "heightened pleading," requirement amends Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE. Although inherent tension exists between Rule 8 and the fact specific pleading requirement, the latter requirement for suits against individuals enjoying qualified immunity neither amends nor violates the FEDERAL RULES OF CIVIL PROCEDURE. Rule 8(a)(2) states that a pleading shall contain a short and plain

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[1] The Respondents use the term "fact specific pleading requirement" rather than "heightened pleading standard" because the former is more specific than the latter, which appears also to encompass the direct evidence pleading requirement of the D.C. Circuit, *see Siegert v. Gilley*, 500 U.S. 226, 229-33, 111 S. Ct. 1789, 1792-93 (1991); *id.* at 1795 (Kennedy, J., concurring), and the heightened production summary judgment requirement common to many circuits, *see, e.g., Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C. Cir. 1993), *petition for cert. filed*, 63 U.S.L.W. 3009 (U.S. June 22, 1994) (No. 93-2068).

statement of the claim *showing that the pleader is entitled to relief.* In a §1983 complaint against an individual government official, a plaintiff fails to show entitlement to relief if he does not both state a violation of a constitutional right, and overcome the individual defendant's qualified immunity. Such an interpretation does not expand or amend Rule 8, but merely applies the language of the rule literally.

In a §1983 cause of action where a defendant is entitled to raise the qualified immunity defense, the defendant official's conduct must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 3042 n.6 (1987). A government official's liability generally turns on the "objective reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39. The law must have been sufficiently clear so as to put the government official on notice that his actions were improper. *Id.* This is a threshold issue that must be resolved at the earliest possible stage in the litigation process. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991); *citing Harlow*, 457 U.S. at 818; 102 S.Ct. at 2738; *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985); *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986); *Anderson*, 483 U.S. at 646 n.6, 107 S.Ct. at 3042 n.6. Since Rule 8 requires a pleader to show in his complaint that he is entitled to relief, the determination of this issue is most appropriate at the pleading stage.

Petitioner states that it is noteworthy that Respondents neither filed a Motion for Summary Judgment, nor sought any discovery in this case. Although the *Harlow* court suggested that the qualified immunity analysis take place on a motion for summary judgment, at the same time it *prohibited discovery* until the immunity question is resolved. *See Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 ("[u]nless the plaintiff's allegations state a claim of violation of a clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery"). *See also Anderson*, 483 U.S. at 646 n.6, 107 S.Ct. at 3042 n.6 (confirms no discovery unless plaintiff's well-pleaded complaint contains disputed material allegations; then *if necessary*, it is limited to the issue of immunity) (emphasis added). Without the factual development through discovery presupposed by the concept of notice pleading, the more appropriate procedural mechanism for qualified immunity determinations is Rule 12(b)(6), not Rule 56. If a defendant wished to attach evidence outside the pleadings, such as an affidavit, the court could treat the motion to dismiss alternatively as a motion for summary judgment pursuant to Rule 12(c). *See* Comment, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 144-45 n.72 and n.73 (1985). The court also has the option of requiring a more definite statement from the plaintiff. *See Siegert*, 500 U.S. at 235-36, 111 S.Ct. at 1795 (plaintiff must plead fact specific allegations once the qualified immunity defense has been asserted) (Kennedy, J., concurring). Since qualified immunity is a threshold issue, and discovery is prohibited until this issue is resolved, a 12(b)(6) motion to dismiss is the most appropriate and effective procedural device to dispose of a §1983 cause of actionable to overcome qualified immunity. In a §1983 case where a plaintiff, such as Petitioner, cannot overcome qualified immunity, he has effectively failed to state a claim showing that the he is entitled to relief, and the case should be disposed at the

earliest possible stage of litigation. Rule 12(b)(6) provides the most expedient and least disruptive means to accomplish this end.

If conclusory allegations could suffice to state a constitutional violation, the protections afforded by the immunity defense would be abrogated in the very manner *Harlow* and *Anderson* sought to avoid. A court must determine whether a plaintiff has asserted a violation of any constitutional right; if such an assertion is made, it must address whether that right is "clearly established" under the facts and circumstances of the case. *Siegert*, 500 U.S. at 232, 111 S.Ct. at 1793. Thus, in order to effectuate the substantive defense of qualified immunity, the factual elements of plaintiff's claim must appear on the face of his complaint with enough particularity that the judge may determine whether the action should go forward. To ensure that the substantive protection afforded by qualified immunity is not abrogated, the fact specific pleading requirement is fundamentally necessary.

The primary purpose of the fact specific pleading requirement is to allow judges to ascertain whether the action should go forward in the face of the substantive defense of qualified immunity. *Elliott*, 751 F.2d at 1480. The requirement is for the plaintiff to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Id.* at 1473. To overcome the immunity defense, plaintiffs must plead specific facts sufficient to place reasonable officials on notice that their actions were improper.[2] *Streetman v.*

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[2] Plaintiffs can plead sufficient facts through any number of procedures. The most obvious is pleading facts in the federal complaint or state petition. Likewise amendments, to be freely permitted under Rule 15(a), will suffice. Courts may also use a more definite statement under Federal Rule of Civil Procedure 12(e), a questionnaire approved by the Fifth Circuit in *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976), or the

Jordan, 918 F.2d 555, 556 (5th Cir. 1990) (requiring qualified immunity to be resolved on the face of the pleadings if possible); *see Hunter*, 502 U.S. at 224, 112 S. Ct. at 536 (requiring qualified immunity to be resolved as early as possible in litigation); *see also Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989) ("*Harlow* [*v. Fitzgerald*]'s clearly established standard demands that a bright line be crossed. The line is not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances."). A court can then compare the facts the plaintiff pleads with the clearly established law the plaintiff pleads the officials violated. *Anderson*, 483 U.S at 646 n.6, 107 S.Ct. at 3042 n.6 (requiring the district court, on remand, to determine whether a reasonable officer could have believed the actions alleged were lawful); *Mitchell*, 472 U.S. at 528 n.9, 105 S.Ct. at 2816 (noting that the immediately appealable issue is whether the pleaded facts support a claim of violation of clearly established law). The reason that bare, legal, broad, and conclusory allegations are unacceptable is that they are not susceptible to proof or disproof such that reasonable officials could understand that what they are doing violates constitutional rights. *See Anderson*, 483 U.S. at 638, 641, 107 S.Ct. at 3038; *Hopkins v. Stice*, 916 F.2d 1029, 1030-31 (5th Cir. 1990) (holding officers are immune if "a reasonable official would be left uncertain of the application of the standard to the facts confronting him").

The substantive defense of qualified immunity prohibits plaintiffs from exposing officials to the burdens associated with litigation. *Mitchell*, 472 U.S at 526, 105 S.Ct. at 2815; *Harlow*, 457 U.S. at 813, 107 S.Ct. at 2735 (listing "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens

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record of a hearing approved by the Fifth Circuit in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). *See Elliott*, 751 F.2d at 1482.

from acceptance of public office"). Without factually specific pleadings, the only method available for officials to prove their entitlement to immunity is engaging in discovery to determine the factual basis of plaintiffs' complaints, then moving for summary judgment on the defense of qualified immunity. If notice pleadings are sufficient to permit plaintiffs to engage in discovery on the issue of immunity, and thereby require defendants to respond with discovery in order to affirmatively prove their immunity defense, the substantive protection afforded by immunity has been breached by exposing officials to the burdens associated with litigation.[3] Permitting such vague pleadings would reduce *Harlow* to a rule of pleading. *See Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39; *see also Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

Petitioner contends that the Fifth Circuit is prohibited from enforcing its fact specific pleading requirement absent an amendment of the FEDERAL RULES OF CIVIL PROCEDURE. This is not the case. The Rules Enabling Act permits the Supreme Court to prescribe general rules for the federal courts, with the limitation that "[s]uch rules may not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Because immune officials have a substantive right

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[3] Although qualified immunity from suit entitles officials to immunity from discovery irrelevant to the issue of qualified immunity until they have had an opportunity to present a motion for summary judgment on the issue, this protection is limited in value because the defense of qualified immunity operates on every issue necessary to establish liability. This is particularly true where the issue of intent is part of the cause of action (as, for example, in virtually every prisoner's Eighth Amendment claim). As this Court noted in rejecting the subjective motivation test for qualified immunity, "[j]udicial inquiry into subjective motivation . . . may entail broad ranging discovery and the deposing of numerous persons . . . ." *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737.

to be free from the burdens associated with litigation, Rule 8 would violate the Rules Enabling Act if it applied to cases involving qualified immunity. *See Elliott*, 751 F.2d at 1479. Notice pleading strips immune officials of their substantive freedom from the burdens of litigation. *Id.* This Court suggested as much by distinguishing its *Leatherman* decision from cases involving qualified immunity because "municipalities do not enjoy immunity from suit." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. at ___, 113 S. Ct. at 1162; *see also Jordan v. Jackson*, 15 F.3d 333, 340 n.5 (4th Cir. 1994) (noting that *Leatherman* "seemed almost to suggest [the question of the fact specific pleading requirement in qualified immunity cases] might be answered in the affirmative").

The inherent tension between the fact specific pleading requirement and Rule 8 does not amount to an amendment of said procedural rule.[4] As the Fifth Circuit stated in *Elliott*:

> The public goals sought by official immunity are not procedural. Indeed they go to very fundamental substantive objectives. To the extent that F.R.Civ.P. 8 and the practices under it present any conflict, the trial court must find a way to adapt its procedures to assure full effectuation of this substantive right, since the Enabling Act provides that the rules shall not abridge, enlarge or modify any substantive right.

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[4] In fact, every circuit has found occasion to require at least a minimum of factual specificity when pleading a civil rights complaint. *See Hobson v. Wilson*, 737 F.2d 1, 30 n.87 (D.C. Cir. 1984), *cert. denied sub nom. Brennen v. Hobson*, 470 U.S. 1084, 105 S.Ct. 1843 (1985) (listing cases).

Elliott, 751 F.2d at 1479. A member of this Court has also recognized this tension:

> The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Siegert, 500 U.S. at 235, 111 S.Ct. at 1795 (Kennedy, J., concurring). Because "the substantive defense of immunity controls," the fact specific pleading standard is a judicial solution to effectuate the immunity defense in a civil rights claim. As Judge Higginbothom, concurring, stated in *Elliott*:

> We must solve judicial problems, and we must not solve legislative problems. My effort has been to demonstrate that it is a judicial problem--defining the content of immunity--that we face here.

751 F.2d at 1483. The fact specific pleading requirement is not a substantive right itself, nor is it a judicial amendment to the FEDERAL RULES OF CIVIL PROCEDURE. Rather, it is a mechanism which allows the immunity defense to be realized, in accordance with the formative principles of the Rules Enabling Act, 28 U.S.C. §2072(b). It is not a technical rule which exists independently from the substantive right with which it is associated. Fact specific pleading assists the district court in no less an objective than "avoid[ing] excessive disruption of government and permit[ting] the

resolution of [] insubstantial claims." *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS COURT'S HOLDING IN LEATHERMAN DOES NOT APPLY TO INDIVIDUAL DEFENDANTS WHO ENJOY QUALIFIED IMMUNITY

Petitioner asserts that the Fifth Circuit's "heightened pleading standards" were struck down by this Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160 (1993). This assertion is both deceptively true and patently false. This Court in *Leatherman* specifically resolved a conflict among the Courts of Appeals concerning the applicability of a heightened pleading standard to §1983 actions alleging *municipal liability*. *Id.* at ___, 113 S.Ct. at 1161. This Court expressly stated that it "h[ad] no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials." *Id.* at ___, 113 S.Ct. at 1162. Since the substantive defense of qualified immunity was not involved in the determination of whether specific pleading requirements are necessary when a municipality is a defendant, this Court's decision in *Leatherman* is distinguishable, and, contrary to Petitioner's assertion, did not strike down the 5th Circuit's specific pleading requirement as to individual government officials.

This Court pointed out the very distinction between municipalities and individual officials that render *Leatherman* inapplicable in a case involving the substantive defense of qualified immunity. Municipalities are not afforded qualified immunity based upon the objective good faith of their agents, as are individual government officials. *Id.* at ___, 113 S.Ct. at 1162; *Owen v. City of Independence*, 445 U.S. 622, 650, 100 S.Ct. 1398, 1415 (1980). Although

municipalities may be immune from *liability* in certain situations,[5] they do not have immunity from suit as do individual officials. *Leatherman*, ___ U.S. at ___, 113 S.Ct. at 1162. When the substantive defense of qualified immunity is not involved, the factual elements of a plaintiff's claim in such a case need not appear on the face of his complaint with enough particularity that the judge may determine whether the action should go forward. *Leatherman*, ___ U.S. at ___, 113 S.Ct. at 1162. The issue of municipal liability, therefore, is not a threshold issue that must be resolved at the earliest possible stage in the litigation process, as is the issue of qualified immunity for individual officials.

Further, there was no underlying substantive right involved in *Leatherman* as in this case. As stated above, the Rules Enabling Act permits the Supreme Court to prescribe general rules for the federal courts, with the limitation that "[s]uch rules may not abridge, enlarge or modify *any substantive right.*" 28 U.S.C. §2072(b)(emphasis added). Because immune officials have the substantive right to be free from the burdens associated with litigation, this case is clearly distinguishable from *Leatherman*. *See Elliott*, 751 F.2d at 1479. *Leatherman* did not involve the substantive right to be immune from suit, and therefore the conflict between the fact specific requirement for §1983 *municipal* defendants and Rule 8 was not governed by the Rules Enabling Act, as is the conflict involving individual officials enjoying qualified immunity.

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[5] "A municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036.

Petitioner contends that the *Leatherman* case should cover all §1983 defendants. In support of this contention, Petitioner cites to a district court order that held that the heightened pleading standard does not apply to CERCLA[6] cases. *Warwick Administrative Group v. Avon Products, Inc.*, 820 F.Supp. 116, 121 (S.D.N.Y. 1993). In addition to the fact that the cited case does not involve a civil rights complaint, the question of qualified immunity was not involved in *Warwick*. Both *Leatherman* or *Warwick* are distinguishable in that the fact specific pleading requirements implemented were not necessary to allow judges to ascertain whether a §1983 action should go forward in the face of qualified immunity. The public goals inherent in the substantive defense of qualified immunity were not at issue in either of these cases, and Petitioner's reliance on them for that purpose is misplaced.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FACT SPECIFIC PLEADING REQUIREMENT SERVES THE RULE OF LAW.

The Fifth Circuit has articulated that reducing the burdens associated with litigation is the policy underlying the fact specific pleading requirement. Typically cited as specific costs are those enumerated in *Anderson* and *Harlow*: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038; *Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736. By themselves these considerations fail to explain why qualified immunity should not be available to private persons. *See Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827, 1833 (1992). Private persons desire to avoid these consequences just as much as government officials do. Distinguishing government officials simply because they

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[6] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§9601 et seq.

work for the public and not because of some related policy unique to government is circular. Thus, because the typically cited policy appears to apply with equal force to private defendants, it does not explain why only government officials have qualified immunity.

The policy that distinguishes between public and private defendants is that, without qualified immunity, government officials will be tempted to avoid the burdens associated with litigation *by applying the law preferentially* in favor of those who seem most likely to sue. Preferential application of the law violates the rule of law, a concept that applies peculiarly to government officials. *See* Black's Law Dictionary 1332 (6th ed. 1990) ("[D]ecisions should be made by the application of known principles or laws without the intervention of discretion in their application"); Friedrich A. Hayek, *The Constitution of Liberty* 209-10 (1960) ("The ideal of the rule of law requires that the state either enforce the law upon others—and that be its only monopoly—or act under the same law and therefore be limited in the same manner as any private person.") This Court has indirectly adopted this policy in its qualified immunity jurisprudence. In *Harlow*, this Court noted one of the policies supporting qualified immunity is the "inhibition of discretionary action." *Harlow*, 457 U.S. at 816, 102 S.Ct. at 2737, *cited by Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815. This policy protects "action taken with independence and without fear of the consequences." *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2738 (internal quotations marks omitted), *cited by Mitchell*, 472 U.S. at 525, 105 S.Ct. at 2815. Likewise, *Anderson* noted "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038; *accord Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736 (finding that "the danger of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (alterations in original)) (quoting *Gregoire v.*

Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803 (1950). This Court best recognized the link between the fact specific pleading requirement and the effective performance of public duties in *Davis v. Scherer*: "The qualified immunity doctrine recognizes that *officials can act without fear of harassing litigation* only if they reasonably can anticipate when their consequences may give rise to liability for damages and *only if unjustified lawsuits are quickly terminated.*" 468 U.S. at 195, 104 S.Ct. at 3019 (emphasis added), *cited by Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038.

This Court has recently made more explicit the connection between officials' fear of harassing lawsuits and the rule of law. In *Wyatt v. Cole*, this Court held that private persons sued in civil rights actions are not entitled to qualified immunity because "extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs." *Wyatt*, ___ U.S. at ___, 112 S. Ct. at 1833-34. *Wyatt* made the connection to the rule of law by citing virtually overruled case law for the policy that survived the cases: "denial of qualified immunity . . . would contribute not to principled and fearless decision-making but to intimidation." *Id.* at ___, 112 S.Ct. at 1833 (internal quotation marks omitted) (quoting *Woods v. Strickland*, 420 U.S. 308, 319, 95 S.Ct. 992, 999 (1975); quoting *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218 (1967), *comprehensively reformulated by Harlow*, 457 U.S. at 814-19, 102 S.Ct. at 2735-39). The intimidation that concerned this Court in *Woods* and *Pierson* is the danger that officials will seek to avoid harassing litigation by preferentially applying the law to those who threaten to sue. *See Pierson*, 386 U.S. at 554, 386 S.Ct. at 1218; *accord Elliott*, 751 F.2d at 1478. Greasing only the squeaking wheel violates the rule of law, the fundament of American jurisprudence.

This justification not only distinguishes between governmental and private defendants, but also demonstrates that immunity from the burdens associated with litigation is the substance of qualified immunity. Litigation that places any burden upon officials gives them an incentive to avoid the burden by giving the people most likely to sue whatever they want. To prevent this unequal application of the law, the doctrine of qualified immunity must protect officials from the burdens associated with litigation, as listed by *Harlow*: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736, *quoted by Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038.

This policy justifies protection only until reasonable officials would know that their actions are unlawful; any further extension would itself violate the rule of law by permitting government officials to violate the law with impunity. *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2738 ("[W]e provide no license to lawless conduct. . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate."); *see Mitchell*, 472 U.S. at 522-523, 105 S.Ct. at 2813 (refusing absolute immunity to high ranking executive officials because absolutely immune officials are those who "are subject to other checks that help to prevent abuses of authority from going unredressed"); *Harlow*, 457 U.S. at 809, 102 S.Ct. at 2733 (refusing to grant absolute immunity to high ranking executive officials because it would afford a "greater potential for a regime of lawless conduct"); *see also Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038 (stating that an action for damages may be the only effective remedy for abuse of office); *Harlow*, 457 U.S. at 818-19, 102 S.Ct. at 2738 ("[A] reasonably competent government official should know the law governing his conduct.").

To judge whether to strip officials of their immunity, trial courts must have information which would inform reasonable officials that their actions were unlawful; requiring fact specific pleading fulfills this function. *See Elliott*, 751 F.2d at 1482. To require less would subject officials to the burdens associated with litigation and create the dangers to the rule of law that this Court's qualified immunity jurisprudence seeks to avoid.

CONCLUSION

Accordingly, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

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